Chapter 1

Internal Investigations
Practical Considerations for Avoiding Pitfalls

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Overview

Internal investigations are a necessary tool for entities to get to the root cause of institutional problems that may cause liability and reputational harm. These internal reviews, when handled correctly, can be valuable tools to identify and account for misconduct, to restore brand confidence, to help victims heal, to educate regulators on corrective action and to set the institution on a new path. When handled poorly, the investigation can cause more problems than it resolves.

Every investigation has its own context, parallel processes, and impacted constituencies. Those circumstances must inform and control the internal review process. There are, however, overarching considerations that can help shape the contours of an investigation and set it on a path for success. Detailed in the following sections are practical considerations designed to identify common “traps for the unwary” that can impair or derail the investigation. Careful and thoughtful preparation, together with consistent practices by all team members, can avoid failure. Attention to these issues can be the difference-maker for a successful process.

1. The author gratefully acknowledges the research assistance of Annica Bianco, Esq.
Threshold Issues

Before undertaking the investigation, it is essential that the following questions be clearly established. Navigating through the many challenges, competing considerations, and interested constituencies that often surround investigations is greatly simplified when the following ground rules guide decision making.

Who Is Your Client?

This is a simple question that can get murky during the investigation. Public companies, private business entities, colleges and universities, churches, and other non-profit organizations, such as health systems or charitable organizations, are run by individuals. Officers, directors, trustees, and special committees all perform important roles with associated duties in the governance and/or operation of the entity. Any of these constituencies in their respective roles may feel compelled to initiate an internal investigation in furtherance of some important institutional purpose. Any of these constituencies may make contact with outside counsel to get the process started. When such contact is made, the first questions must be: Who is the client? From whom do I take direction? To whom do I direct the report of investigation?

Too often in the private practice of law, it is expedient to conflate the interests, desires, and goals as expressed by a senior executive who is directing a project as being coextensive with the interests of the institution. This is not a surprising circumstance, because all entities operate through the actions of their leaders. Internal investigations bring into sharp focus the potential problems with such conflation. Because the investigation is focused on activities of personnel that may have diverged from the interests of the entity, it is essential that the client be identified and interests segregated, maintained, and pursued. Indeed, actions of individuals instrumental in commissioning the investigation may be part of the inquiry. The potential conflicts resulting from this dynamic are manifest and must be managed to ensure the integrity of the review.

For these reasons, the first action is to identify the client and the person or persons who are permitted to speak for the client with regard to the investigation. Often, because the internal inquiry may directly or implicitly criticize the actions of current management, good practice compels that the oversight of the investigation be vested with an outside director/trustee or a special committee of the board of directors/trustees. This practice helps ensure that the inquiry is not tainted by apparent or actual influence by those who are being investigated. Once defined, these details should be documented in an engagement letter specific to the inquiry.

What Is Your Mandate?

The mandate and scope of an investigation must be defined. Misalignment between the client’s expectation and the work contemplated by the investigative team can
lead to material problems. Some investigations can be discrete undertakings, yet, as a result of mismanaged expectations, balloon beyond reasonable scale and cost. Other investigations, such as those involving allegations of sexual abuse, may require special considerations for privacy and victim protection. Considerable damage can be caused when an investigation fails to properly balance important considerations such as protecting victims and attempting to get to the truth. The client must set the tone and the rules for what prevails when the search for the truth threatens other constituencies or threatens to cause harm to important cultural values. To paraphrase Hippocrates, on the way to doing something good, do no harm.

With the goal of doing no harm, it is helpful when the client articulates at the beginning of the engagement—as best as it can subject to learning more information as the investigation unfolds—what it wants investigated and what special considerations should prevail. This should include important information such as subject matter, time period, functional area, types of conduct, relevant individuals, documents, data, and other evidence. Also, the client may wish to detail things that should be excluded from investigation. With this information, the investigative team should build a work plan and budget to address the mandate and scope identified. This exercise should quickly reveal any disconnects between the client and the investigative team concerning the invasiveness, disruption, cost, and other collateral consequences resulting from the investigation. Further, the client should provide instructions on any special circumstance—such as the handling of victims—and how the investigation should yield to these important special circumstances. If the scope needs to be adjusted as the investigation proceeds, communicate that to the client and modify the work plan accordingly. In short—get aligned and stay aligned.

**Who Are the Intended Recipients of the Report?**

Is the report of investigation an internal confidential document not intended for disclosure and subject to privilege protections? Is the report intended for use with regulators, courts, customers, or the public? Is there a possibility of a criminal proceeding, and the attendant prospect of a waiver of the attorney-client and work-product privileges as a condition of a negotiated resolution? All of these are relevant considerations for the logistics of the investigation.

As a practical matter, all investigations start as a privileged undertaking. Care must be taken to mark the report and all drafts with appropriate legends (e.g., “Confidential,” “Attorney Client Privilege,” “Attorney Work Product Prepared in Anticipation of Litigation”). If some form of disclosure is contemplated, or reasonably anticipated, it is essential that the investigative team not include in the report

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2. See infra at “Voluntary Waiver of Privilege to Earn Cooperation Credit.” See also “Individual Accountability for Corporate Wrongdoing,” Sally Quillian Yates, Deputy Attorney General (Sept. 9, 2015) for further discussion of this issue.
any confidential or privileged information that must be protected, as there would likely be a reasonable argument for waiver in that circumstance.

Often the client simply does not know as the investigation unfolds how the report will be used. In such circumstances, it is a best practice to treat it and all drafts as confidential as well as to maintain all of the formalities of the applicable privileges. It is the client’s privilege to waive. In certain circumstances, the client may determine that it needs to disclose the report or use it with regulators, courts, or others. In such situations, it is critical for counsel to determine the scope of the waiver under applicable law. Because the client’s decision needs to be informed by the scope of the waiver, this determination ideally should be made early, before the report is drafted, to guide discussions about disclosure. For example, a “subject matter” waiver may expose the client to the disclosure of other privileged information beyond the report of investigation. Similarly, if less than a “subject matter” waiver is permissible in the relevant jurisdiction, a clear writing from the client concerning the scope of the waiver should accompany the disclosure. Finally, if the risk of subject matter waiver is significant, the client may consider appropriate redactions to preserve claims of privilege. Of note, and as discussed more fully later in the chapter, clients and counsel dealing with the government should not assume that a selective waiver will be upheld.

Is the Investigation Team Independent?

Not all internal investigations are the same. Some are prepared for use by third parties, such as regulators or courts, that will scrutinize whether the investigation was performed with sufficient safeguards of independence to bolster credibility and reliability. Where the review and acceptance by a third party is essential, the efficacy of the investigation is only as good as its independence. Even a brilliantly executed investigation may be worthless in the eyes of these third parties if serious questions arise about the team’s independence. A critical threshold issue—and one that often needs to be re-examined during the life of the project—is whether the investigation team is sufficiently independent of the client and the issues being investigated.

The contemplated benefit of the investigation for use with third parties is to get an unvarnished report of what actually occurred, the actual or potential consequences, and the suggested remedial or mitigating actions. Investigators acting out of a real or perceived conflict may diminish or erode the impact of the report. Recipients of the report who believe that its conclusions and recommendations were improperly influenced by those who might be impacted by the report may dismiss it out of hand. This is particularly problematic if the intended recipients of the report are regulators, courts, or other constituencies who may question the integrity of the report.

An ongoing business relationship with the client, work performed or advice given concerning the subject being investigated, or a previous reporting relationship to someone at the client who is being investigated, are common examples of
circumstances that can undermine a claim of independence. In such a situation, the perception of a conflict may be as damaging as an actual conflict. When such circumstances exist, or arise during the project, the investigation team must examine whether it can perform the independent investigation.

**Who Has the Ability to Edit the Report?**

Determining who will have the right to review and propose edits before the report of investigation is finalized is another important matter to consider. This is very closely related to the questions defining who the client is and how the independence of the investigation can be assured. While there can be material benefits to having various constituencies (such as directors, trustees, and officers) reviewing the report for accuracy, completeness, and consistency with corporate values and norms, such further review may compromise the independence of the report and, therefore, its efficacy with the target audience. Depending on the scope of the investigation and the circumstances under which it arose, it may be necessary and prudent to restrict review and editing of the final report to a small group of decision makers for the client. For example, if an entity is performing a new investigation because a prior one was viewed as being manipulated by the board of directors or management, to avoid the same pitfalls, the new investigators should run a process that insulates the report from such repeated criticism.

Best practices require that those whose conduct is implicated—including the direct actors as well as officers, directors, trustees, consultants, or lawyers who may have been on watch at the time of the offending conduct—should not be part of the review and finalization process except to confirm facts. Similarly, best practices suggest that those who have a direct or material stake in the report because they were victims or whistleblowers should be managed carefully through the review and finalization process. The investigation team may believe it necessary or advisable to have victims or whistleblowers review portions of the final report to ensure accuracy or that privacy has been protected, but input from those parties into the conclusions or recommendations can be problematic and impugn the independence of the report. Tread carefully into these turbulent areas, and identify clear boundaries as to what is permissible and what is not.

**Will the Investigation Require Special Procedures?**

Investigations often require interviewing victims of improper conduct or whistleblowers who purport to be witnesses to unlawful or improper conduct. Both categories present unique issues for the client’s consideration.

With regard to victims of improper conduct—such as sexual assault—the client may want the investigation team to take special precautions during the interview process and in the final report and work papers. For example, private schools that have reported the results of investigations about past sexual assaults by faculty
members and administrators have been accused, after the fact, of being insensitive to the privacy concerns of victims and to the additional harm to the victims caused by the report of investigation. To avoid such criticisms, the use of pseudonyms to anonymize victims is a well-developed convention to protect privacy, yet also report the information learned during the investigation. Unfortunately, it is not always possible to fully protect a victim by simply using a pseudonym. Other facts revealed may allow certain readers to deduce the identity of the victim(s). In such circumstances, the rehabilitation and goodwill expected from the investigative report can be diminished or overshadowed by the revictimization of those originally harmed. Forethought, planning, and clear direction from the client should help avoid such a circumstance.

Will the Investigation Involve “Whistleblowers”?

Similarly, whistleblowers—individuals who disclose suspicions of unlawful, unethical, or prohibited corporate conduct—present special circumstances in an internal investigation. Special handling is essential in light of the protections that a whistleblower may have. A patchwork of federal and state laws provide protections to


bona fide whistleblowers. While there are clear differences between and among these statutes, one common principle is there can be no retaliation against whistleblowers for disclosing offending conduct. Investigators must be knowledgeable
about these protections and conduct the investigation in ways that do not erode or impair these protections.

It is common during an investigation to learn that there are independent bases to take a job action against the whistleblower, unrelated to his or her disclosures. In some circumstances, the whistleblower's disclosures are nothing more than a cynical attempt to thwart an impending job action. In other circumstances, the whistleblower participated or contributed to the offending activity being investigated. Because of these complicating dynamics, the whistleblower often will have retained counsel who wants to participate in any interview with her/his whistleblower-client. The protections afforded whistleblowers make it more challenging, but not impossible, to get to the truth of the allegations and for the investigators to make appropriate remedial action recommendations, including termination of the whistleblower, if the protections have not been appropriately implicated. All of these issues require careful management and particular attention to the governing law.

5. On the duty to cooperate, see Merkel v. Scovill, Inc., 787 F.2d 174, 179 (6th Cir. 1986) (reversing a finding by the district court that the plaintiff's nonparticipation in the investigation was “protected activity,” holding that “discrimination against an employee for lack of participation or nonparticipation in an investigation would not be a violation of the ADEA”); Thomas v. Norbar, Inc., 822 F.2d 1089 (holding that since there was no evidence that plaintiff's supervisors had pressured him to lie or give information regarding matters about which he had no knowledge, his refusal to participate in the investigation was not protected activity); City of Hollywood v. Witt, 939 So. 2d 315, 317 (Fla. Dist. Ct. App. 2006) (holding that the verdict on the whistleblower claim could not stand because "the existence of reasons for termination, apart from any alleged whistleblowing, constitutes a defense that is expressly recognized by the whistle-blower act"); On no right to counsel, see In re Carroll, 339 N.J. Super. 429, 440, 772 A.2d 45, 52 (App. Div. 2001) (holding that "the Sixth Amendment right to counsel does not extend to internal investigations"); Williams v. Pima Cnty., 791 P.2d 1053 (holding that the right to counsel under the Sixth Amendment applied only to criminal proceedings, and did not confer right to counsel upon an officer being interrogated by sheriff's department during internal affairs investigation).

6. On whistleblower protections, see Somers v. Digital Realty Trust Inc., 850 F.3d 1045, 1048 (9th Cir. 2017) (citing 15 U.S.C.A. § 78u-6) ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."); Grisham v. United States, 103 F.3d 24, 26 (5th Cir. 1997). See 5 U.S.C. § 2302(b)(8) ("The Whistleblower Protection Act was enacted in 1989 to increase protections for whistleblowers by prohibiting adverse employment actions taken because a federal employee discloses information that the employee reasonably believes evidences a violation of any law or actions that pose a substantial and specific danger to public health or safety."); On requirements for a whistleblower protection claim, see Willis v. Dep’t of Agric., 141 F.3d 1139, 1144 (Fed. Cir. 1998) (regardless of whether the adverse personnel action is taken in retaliation for a protected disclosure, or is a result of the disclosure, the whistleblower need only demonstrate that the protected disclosure was one of the factors that affected the personnel action); Hickson v. Vescom Corp., 2014 ME 27, ¶ 17, 87 A.3d 704 ("To prevail on a [WPA] claim, an employee must show that (1) he engaged in activity protected by the WPA; (2) he experienced an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action."); see also Galouch v. Dep’t of Prof’l & Fin. Regulation, 2015 ME 44, ¶ 12, 114 A.3d 988, 992; see also Miller v. City of Millville, 2014 WL 10122644, at 6 (N.J. Super. L.) ("In order to establish a prima facie case of retaliation under CEPA, the plaintiff must demonstrate the following elements: 1. he reasonably believed illegal conduct was occurring; 2. he disclosed or threatened to disclose the activity..."
While the whistleblower has certain rights, the investigation team has a mandate that must be fulfilled. When confronted with these dynamics, it is important to understand the governing law and whether the whistleblower protections have been validly implicated, to disaggregate and isolate the issues investigated into those that may receive protection and those that do not, and to make specific recommendations to the client regarding these different buckets of protected and unprotected conduct.

**Establishing the Privilege: *Upjohn* Warnings**

The ability of an entity to conduct and preserve as privileged an internal investigation rests on certain requirements recognized by the U.S. Supreme Court in *Upjohn Co. v. United States*. The Court recognized an organization’s attorney-client privilege when: (1) the communication was made by an entity’s employee, (2) to counsel for the entity acting as such, (3) at the direction of corporate superiors, (4) in order to secure legal advice from counsel, (5) concerning matters within the scope of the employee’s duties and (6) the employee was aware that the purpose of the questioning was so that the entity could obtain legal advice.

From these principles have sprung standard warnings for witness interviews, called *Upjohn* warnings or sometimes “corporate *Miranda* warnings,” designed to ensure that the elements of the attorney-client privilege are established for the benefit of the corporation, not the individual witness. The essential information that the entity’s counsel must convey includes instructing the witness that (1) the attorney represents the entity alone and not the individual (unless a joint representation is expressly contemplated, in which case such representation should be carefully delineated); (2) the attorney is investigating facts for the purpose of providing legal advice to the entity; (3) the communication is protected by the attorney-client privilege, and that the privilege belongs to the entity alone, and not to the witness (unless a joint representation is expressly contemplated, which, again, should be carefully considered and delineated); (4) the entity may choose to waive the privilege and disclose the substance of the communication to third parties, including the government; and (5) the communication is confidential and must be kept that way by the witness and not disclosed to third parties except...